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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

RICHARD JAMES BERKOWITZ,

Defendant and Appellant.

F062486

(Super. Ct. No. BF128757A)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. John S. Somers, Judge.

Deborah L. Hawkins, under appointment by the Court of Appeal, for Defendant and Appellant.

* Before Hill, P.J., Levy, J. and Kane, J.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez and Rebecca Whitfield, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Richard James Berkowitz was convicted after a jury trial of sexual penetration by force (Pen. Code, § 289, subd. (a)(1); count 2) and lewd and lascivious acts upon a child of 14 years (Pen. Code, § 288, subd. (c)(1); count 4).¹ The trial court sentenced appellant to a total prison term of eight years as follows: the upper term of eight years for count 2, and the upper term of three years for count 4, stayed pursuant to section 654. In this appeal, appellant contends the court abused its discretion in imposing the upper term for count 2 based on its finding that the victim was particularly vulnerable. Finding no abuse of discretion, we will affirm.

FACTS²

On the night of July 19, 2009, Hannah P., who was then 14 years old, went to a friend's house, where she consumed multiple alcoholic beverages until she felt "dizzy" and "blurry." She eventually fell asleep around 4:00 or 5:00 a.m.

Hannah woke up and started to walk home around 7:30 or 8:00 a.m. Before she left her friend's house, she drank about a fourth of a bottle of wine. As she was walking home, Hannah stopped at a gas station to get a lighter for her cigarette. Afterwards, she lay down on a patch of grass in front of a bank. She was still feeling the effects of the alcohol and thought she needed to sleep or she would pass out.

When Hannah woke up, appellant was putting her inside his white pickup truck. Appellant then drove Hannah to his house. She recalled that the trip lasted around 10

¹ The jury deadlocked on additional charges of rape by force (count 1), oral copulation (counts 3, 5, 6, & 8), sexual penetration by force (count 7) and false imprisonment (count 9). The trial court declared a mistrial as to those counts, which were ultimately dismissed.

² Our factual summary recites only facts relevant to the counts upon which appellant stands convicted and the issue he raises on appeal.

minutes and that appellant “drove zigzag through the neighborhoods.” Appellant’s driving gave Hannah the impression that he was trying to confuse her so she would not remember where his house was.

The next thing Hannah recalled was waking up inside appellant’s house. She found herself sitting in a chair in his living room and felt “scared” and “freaked out” because she did not know where she was. Appellant talked to Hannah and assured her that everything was okay. He explained that he saw her on the side of the road and he picked her up because he did not want the police to pick her up or for her to get in trouble. Appellant got Hannah a cup of water to drink. By this time, Hannah had stopped feeling scared and freaked out. She felt she could trust appellant, who “seemed normal, like not a criminal or anything.” Appellant also offered several times to let Hannah use his cell phone to call her mother, but she declined because she did not want her mother to see her calling from an unfamiliar number and start worrying.

Appellant reminded Hannah of all the cigarettes she had and asked if she wanted to go smoke one. Hannah started walking towards the front door, but appellant said he did not want people to see her smoking a cigarette in front of his house and directed her to the backyard. In the backyard, Hannah smoked a cigarette and appellant smoked marijuana. While they were in the backyard, appellant asked Hannah how old she was and what she had been doing the night before. Appellant said he thought Hannah was 13 years old. She told him she was actually 14 years old. Appellant told Hannah she was too young to be out drinking and doing the things she did.

Eventually, appellant and Hannah went back inside the house and Hannah went to the bathroom to throw up. After Hannah threw up, she felt “[l]ess drunk and better.” She returned to the living room and sat down in the chair where she had sat earlier. Appellant and Hannah watched television for 10 to 15 minutes. Appellant continued to talk. He told Hannah his wife, Shannon, was at work, and that he had dropped his kid off at daycare before he saw Hannah.

Hannah looked at the clock by the television and saw it was 11:30 a.m. She told appellant she had to go home because it was getting late. Appellant responded that she

“wasn’t going anywhere.” His voice was “[h]arsh and mean.” Hannah became scared as she realized appellant was not trying to protect her from getting in trouble.

Appellant pinned Hannah’s arms down so that she could not get up from the chair. Standing over her, appellant started telling Hannah to take her clothes off. Hannah said “no” several times. Hannah finally took her clothes off after appellant said, “don’t make me get rough” and “I don’t want to hurt you, but if I have to I will.”

Appellant eventually took Hannah by the wrist to his bedroom. He told her to lie down on the bed. He then went and got a sex toy, which he inserted into her vagina. Afterwards, he made her take a shower.

After Hannah showered, she dressed and got back into appellant’s truck. Appellant drove Hannah to Stockdale High School. Hannah asked appellant to drop her off there because she did not want him to know where she lived. She then walked back to her house, arriving around 12:30 or 1:00 p.m.

While they were driving to the high school, appellant asked Hannah why she was crying. Appellant told Hannah he did not do anything to hurt her, he was just trying to help her and teach her a lesson, and nothing would have happened if she had not been out partying with her friends.

DISCUSSION

Appellant contends the trial court abused its discretion in imposing the aggravated term because its finding that the victim was particularly vulnerable is not supported by the record.³ We disagree.

³ The trial court gave the following explanation for its sentencing choice: “As and for circumstance in mitigation, I find that the defendant has no known prior record of criminal conduct. That is certainly a significant factor given his age of 45 years at the present time. As and for circumstance in aggravation, I do find, and considering only the evidence in the case as it relates to Counts 2 and 4 in the circumstances surrounding this case, that the victim was particularly vulnerable and that she was intoxicated to the point of being unable to care for herself when the offense began. In addition, she was a minor unable to transport herself, who was transported to, essentially, an unknown location and was, therefore, unable to make any kind of escape or get herself to a place of safety on her own. Both of those circumstances, I think, are circumstances of significant weight. However, in exercising my discretion and considering the

We review the trial court's sentencing decision for abuse of discretion. (*People v. Lamb* (1988) 206 Cal.App.3d 397, 401.) The court's sentencing choice will be upheld unless defendant shows the sentence was arbitrary or irrational. (*People v. Hubbell* (1980) 108 Cal.App.3d 253, 260.)

The vulnerability of a victim is a proper consideration in sentencing a defendant. (California Rules of Court, rule 4.421(a)(3).) "[A] 'particularly vulnerable' victim is one who is vulnerable 'in a special or unusual degree, to an extent greater than in other cases. Vulnerability means defenseless, unguarded, unprotected, accessible, assailable, one who is susceptible to the defendant's criminal act. An attack upon a vulnerable victim takes something less than intestinal fortitude. In the jargon of football players, it is a cheap shot.' [Citation.] [California Rules of Court, rule 4.421(a)(3)] has thus far been applied exclusively in criminal cases involving violent felonies, where the age or physical characteristics of the victim, or the circumstances under which the crime is committed, make the defendant's act especially contemptible." (*People v. Bloom* (1983) 142 Cal.App.3d 310, 321-322, fn. omitted.)

In challenging the trial court's vulnerability finding, appellant implicitly concedes the victim was particularly vulnerable when he first saw her on the side of the road and proceeded to place the semi-conscious 14-year-old into his pickup truck and drive her to his house. However, he asserts she was no longer particularly vulnerable at the time of the commission of the sexual penetration offense because, by that time, she was no longer so intoxicated that she was completely unable to take care of herself or make an attempt to leave.

Appellant's claim that the victim lost her particular vulnerability because of her diminished state of intoxication at the time the offense is wholly unconvincing and does not merit extended discussion. "It is proper to focus upon *the total milieu* in which the commission of the crime occurred in assessing vulnerability...." (*People v. Price* (1984)

weight of each of those circumstances, the Court does believe that it is appropriate to impose the upper or aggravated term in this case as to Count 2."

151 Cal.App.3d 803, 814, italics added.) Particular vulnerability was properly found when “the victim was isolated and not subject to help from individuals who were passing by.” (*People v. Ramos* (1980) 106 Cal.App.3d 591, 607, disapproved on another ground in *People v. Scott* (1994) 9 Cal.4th 331, 356.) Here, appellant commenced a sexual assault on a 14-year-old girl, whom he had isolated inside his house, after spending several hours engaging in behaviors apparently calculated to gain her trust. Appellant’s sympathetic facade evaporated the instant the victim expressed the desire to go home. On the record before us, we have no difficulty concluding that the trial court did not abuse its discretion when it relied on the vulnerability of the victim to impose the aggravated term.

DISPOSITION

The judgment is affirmed.